

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

FILED
2000 AUG 21 A 10:17

IN RE:

§ CASE NO. 95-20512

§

§ Judge Arthur Spector

§ Objection Docket 97-0004

§ (Chapter 11)

DOW CORNING CORPORATION,

§

§ Civil Case No. 00-CV-73017 (HCFA) ✓

§ Civil Case No. 00-CV-73018 (IHS) ✓

§ Civil Case No. 00-CV-73016 (DoD) ✓

§ Civil Case No. 00-CV-73019 (VA)

§

DEBTOR.

§ Hon. Denise Page Hood

**JOINT MOTION TO CONSOLIDATE UNITED STATES OF AMERICA'S
APPEALS OF ORDER GRANTING PARTIAL SUMMARY JUDGMENT
AND BRIEF IN SUPPORT THEREOF**

TO THE HONORABLE DENISE PAGE HOOD,
UNITED STATES DISTRICT COURT JUDGE:

The Official Committee of Tort Claimants' ("Tort Claimants Committee") and Dow Corning Corporation ("Debtor") (collectively, "Movants") file this Joint Motion to Consolidate United States of America's Appeals of Order Granting Partial Summary Judgment (the "Motion") and respectfully state as follows:

A. PRELIMINARY STATEMENT

1. Pursuant to Fed. R. Civ. P. 42(a) made applicable to contested matters by Bankruptcy Rule 7042, Movants seek to consolidate the four separate appeals of the bankruptcy court's June 23, 2000 Order Granting Partial Summary Judgment Disallowing Portions of Claims of United States of America ("Order") brought by the United States of America ("USA") on behalf of four of its agencies, into one appeal proceeding pending before this Court. The four

4

appeals are virtually identical, unquestionably related, and consolidation should be ordered to avoid the costs associated with duplicative proceedings.

B. PROCEDURAL BACKGROUND

2. In January 1997, the USA filed four separate proofs of claim on behalf of four agencies of the United States: the Department of Veteran Affairs ("VA"), Health Care Financing Administration (Department of Health and Human Services) ("HCFA"), Indian Health Services (Department of Health and Human Services) ("IHS"), and the Department of Defense ("DOD") (collectively the "USA Claims"). The USA Claims seek to recover the costs of medical care either provided or paid for by these agencies as a result of injuries allegedly caused by breast implants manufactured by or containing materials supplied by the Debtor. The USA Claims were nonspecific, broad and all-encompassing, purporting to preserve all monetary claims arising under statutory rights available to the USA. The HCFA claim is based on the Medicare Secondary Payer Act ("MSP"), 42 U.S.C. § 1395y. The IHS, VA and DoD claims are based on the Federal Medical Care Recovery Act ("MCRA"), 42 U.S.C. §§ 2651-2653.

3. Soon after the USA Claims were filed, the Debtor and the Tort Claimants' Committee contested their adequacy. The Debtor filed Objections to Claims of the United States and the Tort Claimants' Committee filed Objections and Counterclaims for Subordination to Claims of the United States. By Order entered August 6, 1998, the independent Objections filed by the Debtor and the Tort Claimants' Committee were consolidated onto one proceeding designated on the Court's docket in all matters for all purposes as Claim Objection Nos. 4-7. A copy of the consolidation order is attached hereto as Exhibit "A." Eventually, after three years of litigation and an ongoing refusal by the USA to document its claims, a joint motion for summary judgment disallowing virtually all of the USA Claims was filed by Appellees.

4. On October 27, 1999, the bankruptcy court entered its Order on Motion to Compel (“Disallowance Order”) which partially disallowed the unidentified USA Claims against the Debtor which sought to recover the costs of all Dow Corning implant-related medical care allegedly paid for or provided to largely unknown federal beneficiaries by the USA. The Disallowance Order also limited the USA’s discovery of certain information and granted the USA access to other requested information. The USA appealed the Disallowance Order under Civil Case No. 99-CV-75380 (the “First Appeal”). This Court’s ruling on the USA’s appeal of the Disallowance Order is believed to be imminent.

5. On November 30, 1999, the bankruptcy court issued its Order Confirming Amended Joint Plan of Reorganization as Modified (the “Confirmation Order”). On December 1, 1999, the bankruptcy court issued its Amended Opinion Regarding Cramdown on Class 15, which included the Government Payor claims of the United States (collectively, the “Confirmation Order”). The USA appealed the Confirmation Order under Civil Case No. 99-CF-75799 (the “Second Appeal”). This Court’s ruling on the USA’s appeal of the Confirmation Order is also believed to be imminent.

6. On June 23, 2000, the bankruptcy court entered its Order Granting Partial Summary Judgment (“Partial Summary Judgment Order”) which (i) fully disallowed the undocumented claims filed by the USA on behalf of HCFA and the DoD for identified alleged individual reimbursement claims on behalf of these two agencies; and further (ii) disallowed those undocumented identified alleged claims filed on behalf of the VA and IHS. The remainder of claims filed on behalf of the VA and IHS for which documents were produced, remain to be litigated. On July 12, 2000, the four USA agencies initiated four separate appeals on behalf of each agency to the Partial Summary Judgment. This third most recent round of appeals appear

on this Court's docket as the following four case numbers: Civil Case Civil Case No. 00-CV-73016 (DoD); Civil Case No. 00-CV-73017 (HCFA); Civil Case No. 00-CV-73018 (IHS) and Civil Case No. 00-CV-73019 (VA). In conjunction with these four appeals, the USA filed four separate Statements of Issues to Be Presented on Appeal to the Partial Summary Judgment Order. It is anticipated that four separate records on appeal will be proffered. This Motion is addressed to and seeks consolidation of these four separate USA appeals of the Partial Summary Judgment.

C. BRIEF IN SUPPORT OF RELIEF REQUESTED

7. Generally, the Bankruptcy Rules, rather than the Federal Rules of Appellate Procedure, apply to an appeal from a bankruptcy court to a district court. 20 MOORE'S FEDERAL PRACTICE ¶ 306.20 (3d ed.) Pursuant to Fed. R. Civ. P. 42, made applicable to contested matters by Bankruptcy Rule 9014, Movants request that the Court enter an order consolidating the four referenced USA appeals under Civil Case No. 00-CV-73016, the earliest case designation. In pertinent part, Fed. R. Civ. P. 42 provides as follows:

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Fed. R. Civ. P. 42(a).

8. Consolidation is appropriate in this instance because each of the four appeals involve common questions of law and fact that will determine whether the USA Claims will be disallowed. The parties and the Court will benefit from the proposed consolidation based on the streamlining of the litigation and the reduction of costs, and the probable decrease in the use of court time and resources.

IV. ARGUMENT AND AUTHORITIES

9. Consolidation under Fed. R. Civ. P. 42(a) is proper when two actions involve common questions of law or fact and the Court determines that consolidation will avoid unnecessary costs or delay. *See Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1161 (5th Cir. 1992), *cert. denied*, 506 U.S. 1079 (1993). Under the Federal Rules of Civil Procedure, joinder of claims, parties and remedies is strongly encouraged. *See, e.g., United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130 (1966).

10. In determining whether to consolidate two or more actions, courts often balance (a) the efficiency resulting from the prosecution of one action, as opposed to multiple instances of related litigation, and (b) possible problems resulting from consolidation. *See, e.g., Arnold v. Eastern Airlines, Inc.*, 681 F.2d 186, 193 (4th Cir. 1982), *cert. denied*, 460 U.S. 1102 (1983) (the court should balance the saving of time and judicial resources resulting from consolidation against any resulting inconvenience, delay or expense); *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1284-85 (2d Cir. 1990), *cert. denied*, 498 U.S. 920 (1990) (the court must consider the risk of inconsistent adjudications of common factual or legal issues, the relative burden posed by multiple actions on the parties, witnesses and available judicial resources, and the time required to conclude multiple suits as opposed to a single action, and the relative expense to all concerned of a single trial as opposed to multiple trials). Courts have also noted that notions of convenience and economy do not take precedence over the concern for a fair and impartial trial. *Celotex Corp.*, 899 F.2d at 1286. Therefore, when a party opposing consolidation demonstrates substantial prejudice, consolidation will be denied. *See In re Megan-Racine Assoc., Inc.*, 176 B.R. 687, 691 (Bankr. N.D.N.Y. 1994) (citations omitted).

11. In this case, the prosecution of four appeals will inevitably result in duplicative litigation in the same forum. The USA's Statement of Issues on Appeal in all four cases are virtually identical. The evidence (or lack thereof) in support of the USA Claims will vary by degrees but not by substance. The MSP, (applicable to the claim of HCFA), and the MCRA, (asserted in support of the IHS, VA and DoD claims), both grant the federal government a statutory right of recovery and as Judge Spector noted, "when liability is in dispute, the MSP essentially mirrors the MCRA." (June 22, 2000 Opinion, citing *Cf. Health Ins., Ass'n*. 23 F.3d at 419.)

12. It is beyond question that the parties and the Court will conserve time and judicial resources by consolidating all four appeals into one appeal under Civil Case No. 00-CV-73016. Further, there is no substantial prejudice which will result from the proposed consolidation. All of the parties and operative facts to all four USA appeals are the same. The only variable will be the documentation provided by the USA in support of its claims for identified/unidentified claimants who have received federal benefits.

13. Although the Bankruptcy Rules are applicable to these appeals, the federal appellate rules are consistent with respect to consolidation. Fed. R. App. P. Rule 3(b)(1) provides in relevant part that when two or more parties are entitled to appeal from a district court judgment or order, and their interests make joinder practicable, they may file a joint notice of appeal. Courts applying Fed. R. App. P. 3 have routinely held that consolidation is appropriate if a single party has two appeals pending in the same cause of action, or if a party is an appellee in several separate appeals involving the same question. When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated. Fed. R. App. P. 3(b)(2). Generally, appeals involving different appellants or appellees may be consolidated, provided the issues

presented for appeal are the same. (Appeals were consolidated for administrative convenience because they presented same legal issue, but all cases given individual decision and caption.)

United States v. Tippet, 975 F.2d 713,718 (10th Circ. 1992)

14. Where as in the case at bar, the appeals present the same legal issues, have a common origin, arose out of a single trial, were taken from a single judgment, and prior consolidation of objections to the four USA Claims had previously been entered, consolidation is appropriate. *Fuller Brush Co. v. Northern States Power Co.*, 261 F. 2d 340 (8th Circ. 1958) (court denied plaintiff's motion to sever its appeal as to third defendant since appeals had common origin, arose out of a single trial, and were taken from a single judgment.)

V. CONCLUSION

WHEREFORE, Movants respectfully requests the Court consolidate all four USA appeals designated herein under Civil Case No. 00-CV-73016 and grant such other and further relief as is just and proper.

Dated: August 17, 2000.

VERNER, DIPPERT, BERNHARD,
MCIPHERSON & HAND, CHARTERED

By: _____

Patrick L. Hughes
1111 Bagby Street, Suite 4700
Houston, Texas 77002
Telephone: (713) 225-7200
Facsimile: (713) 752-2199

KRAMER LEVIN NAFTALIS
& FRANKEL LLP
Kenneth H. Eckstein
Jeffrey S. Trachtman
919 Third Avenue
New York, New York 10022
Telephone: (212) 715-9100
Facsimile: (212) 715-8000

MITTELSTAEDT and McNEELY, P.C.
Henry J. Mittelstaedt, III
445 South Livernois, Suite 224
Rochester Hills, MI 48307
Telephone: 248-652-8200
Facsimile: 248-652-8482

ATTORNEYS FOR THE OFFICIAL
COMMITTEE OF TORT CLAIMANTS

AND

SHEINFELD, MALEY & KAY, P.C.

By: _____
George H. Tarpley
Peter A. Nolan
1700 Pacific, Suite 4400
Dallas, Texas 75201
Telephone: (214) 953-0700
Facsimile: (214) 953-1189

ATTORNEYS FOR DEBTOR

CERTIFICATE OF CONFERENCE

Counsel for Movants has conferred with counsel for the USA on the need for the relief in this Motion. Agreement could not be reached on all of these issues as yet, despite bona fide discussions. Efforts to narrow any disputes will continue.



Patrick L. Hughes

**KRAMER LEVIN NAFTALIS
& FRANKEL LLP**

Kenneth H. Eckstein
Jeffrey S. Trachtman
919 Third Avenue
New York, New York 10022
Telephone: (212) 715-9100
Facsimile: (212) 715-8000

MITTELSTAEDT and McNEELY, P.C.

Henry J. Mittelstaedt, III
445 South Livernois, Suite 224
Rochester Hills, MI 48307
Telephone: 248-652-8200
Facsimile: 248-652-8482

**ATTORNEYS FOR THE OFFICIAL
COMMITTEE OF TORT CLAIMANTS**

AND

SHEINFELD, MALEY & KAY, P.C.

By: 

George H. Tarpley
Peter A. Nolan
1700 Pacific, Suite 4400
Dallas, Texas 75201
Telephone: (214) 953-0700
Facsimile: (214) 953-1189

ATTORNEYS FOR DEBTOR

CERTIFICATE OF CONFERENCE

Counsel for Movants has conferred with counsel for the USA on the need for the relief in this Motion. Agreement could not be reached on all of these issues as yet, despite bona fide discussions. Efforts to narrow any disputes will continue.


Patrick L. Hughes

CERTIFICATE OF SERVICE

PLEASE TAKE NOTICE that on August 17, 2000, a true copy of the foregoing pleading was served via overnight courier, facsimile transmission, hand delivery or certified mail, return receipt requested upon the parties listed in the Order Establishing Non-Implant Claim Objection Administrative Procedures, and the parties listed below:

Donald Bernstein, Esq.
Ogden Lewis, Esq.
Michael Flynn, Esq.
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, NY 10017

Sheldon S. Toll, Esq.
Sheryl L. Toby, Esq.
Mike Friedman, Esq.
HONIGMAN MILLER SCHWARTZ
& COHN
2290 First National Building
Detroit, MI 48226-3583

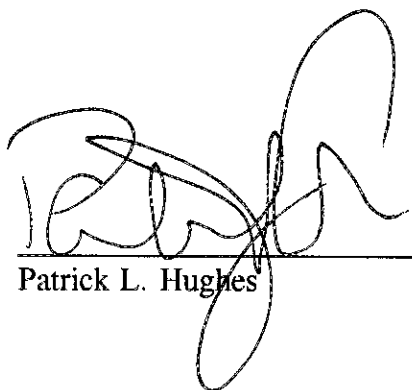
H. Jeffrey Schwartz, Esq.
BENESCH, FRIEDLANDER,
COPLAN & ARONOFF, LLP
2300 BP America Building
200 Public Square
Cleveland, OH 44114-2378

Leslie Berg (Case Trustee)
Marion Mack, Jr.
Asst. U.S. Trustee
1760 McNamara Bldg.
477 Michigan Avenue
Detroit, MI 48226

Julia Caroff, Esq.
U.S. Attorney, E.D. of Michigan
U.S. Department of Justice
Room 203, Federal Boulevard
1000 Washington Street
Bay City, MI 48708

Ruth Harvey, Esq.
Mary Bohan, Esq.
Glen Gillette, Esq.
Lacy R. Harwell, Esq.
Anne McCormick, Esq.
U.S. Attorney
U.S. Department of Justice
Post Office Box 875
Ben Franklin Station
Washington D.C. 20044
(Via Fax: 202-514-9163)

Janet Reno, Esq.
U.S. Attorney General
10th Street & Constitution Ave., N.W.
Washington, D.C. 20420



Patrick L. Hughes

**UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION**

IN RE:

DOW CORNING CORPORATION

Debtor.

§ **Case No. 95-20512**
§
§ **(Chapter 11)**
§
§ **Judge Arthur J. Spector**
§
§ **Claim Objection Docket No. 97-0004**
§

**(CLAIM OBJECTION NOS. 4 - 7)
ORDER CONSOLIDATING OBJECTIONS TO CLAIMS OF
THE UNITED STATES FILED BY THE DEBTOR AND THE
OFFICIAL COMMITTEE OF TORT CLAIMANTS**

CAME ON FOR CONSIDERATION the Objections to Claims of the United States filed by Dow Corning Corporation ("Debtor") and the Objections and Counterclaim for Subordination to Claims of the United States filed by the Official Committee of Tort Claimants ("Tort Claimants' Committee") (collectively "Objections") and Responses to the Objections filed by the United States; and the Court after considering the pleadings before it has concluded that consolidation of the Objections is appropriate. It is therefore,

ORDERED that the independent Objections filed by the Debtor and the Tort Claimants' Committee to the: (i) Health Care Financing Administration Claim of the United States ("Claim Objection No. 4"); (ii) Department of Health and Human Services, Indian Health Services Claim of the United States ("Claim Objection No. 5"); (iii) Department of Veterans Affairs Claim of the United States ("Claim Objection No. 6"); and (iv) Department of Defense Claim of the United States ("Claim Objection No. 7"); are consolidated into one proceeding to be designated on the Court's docket in all matters for all purposes as Claim Objection Nos. 4-7.



100

DATED this 6th day of August, 1998.



ARTHUR J. SPECTOR
UNITED STATES BANKRUPTCY JUDGE

KRAMER LEVIN NAFTALIS
& FRANKEL LLP
Kenneth H. Eckstein
Jeffrey S. Trachtman
919 Third Avenue
New York, New York 10022
Telephone: (212) 715-9100
Facsimile: (212) 715-8000

MITTELSTAEDT and McNEELY, P.C.
Henry J. Mittelstaedt, III
445 South Livernois, Suite 224
Rochester Hills, MI 48307
Telephone: 248-652-8200
Facsimile: 248-652-8482

ATTORNEYS FOR THE OFFICIAL
COMMITTEE OF TORT CLAIMANTS

AND

SHEINFELD, MALEY & KAY, P.C.

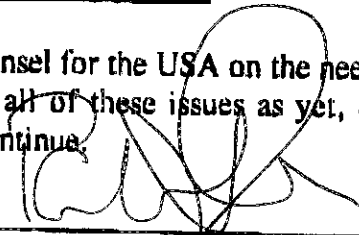
By: 

George H. Tarpley
Peter A. Nolan
1700 Pacific, Suite 4400
Dallas, Texas 75201
Telephone: (214) 953-0700
Facsimile: (214) 953-1189

ATTORNEYS FOR DEBTOR

CERTIFICATE OF CONFERENCE

Counsel for Movants has conferred with counsel for the USA on the need for the relief in this Motion. Agreement could not be reached on all of these issues as yet, despite bona fide discussions. Efforts to narrow any disputes will continue.


Patrick L. Hughes

VERNER · LIIPFERT
BERNHARD · McPHERSON & HAND
CHARTERED

1111 BAGBY, SUITE 4700
HOUSTON, TEXAS 77002
(713) 225-7200
FAX: (713) 752-2199

Writer's Direct Dial:
713-225-7207

August 21, 2000

VIA FEDERAL EXPRESS

U.S. District Court Clerk
Eastern District of Michigan
Southern Division
235 Theodore Levin, U.S. Courthouse
231 West Lafayette Blvd.
Detroit, MI 48226

Re: *In Re Dow Corning Corporation*; Case No. 95-20512

Dear Sir:

Enclosed please find the original executed signature page of Peter Nolan, counsel for Dow Corning Corporation, for the following document:

Joint Motion to Consolidate United States of America's Appeals of
Order Granting Partial Summary Judgment and Brief in Support
Thereof

The Joint Motion was sent to the Court on August 17, 2000, with a facsimile signature page. Please replace the facsimile copy in the court's file with the original signature page at your convenience. Should you have any questions concerning the above, please feel free to call me at 713-225-7207. Thank you for your assistance in this matter.

Very truly yours,


Patrick L. Hughes

PLH/am
Enclosures

05526.0014 Houston 154056.1

■ WASHINGTON, DC ■ HOUSTON ■ AUSTIN
■ HONOLULU ■ LAS VEGAS ■ MCLEAN ■ MIAMI